

NTSB Order No. EA-4014

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 4th day of November, 1993

Dockets SE-11488 and  
SE-11489

## 6169

30 days for respondent Forrest, for their alleged violations of sections 91.75(b) and 91.9 of the Federal Aviation Regulations, "FAR," 14 CFR Part 91.<sup>2</sup> As we find, for reasons discussed below, no merit in respondents' several objections to the law judge's disposition of the matter, their appeal will be denied.

The orders of suspension, which served as the complaints in this action, alleged among other things the following facts and circumstances:

2. On or about February 18, 1990, you [that is, respondent Forrest as pilot in command and respondent Heimerl as second in command] operated...civil aircraft N282MC, a North American NA-265-40, on an IFR [instrument flight rules] flight from Marietta, Georgia to Stuart, Florida.

3. During the course of said flight, when approaching the vicinity of Orlando, Florida, N282MC was given an instruction by Air Traffic Control [ATC] to turn right to a heading of 360 degrees.

4. After receiving said instruction N282MC initiated a left turn.

5. The left turn initiated by N282MC resulted in a conflict with another aircraft in the area.

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<sup>2</sup>FAR section 91.75(b), subsequently amended and recodified as 91.123(b), and section 91.9, now 91.13(a), provide as follows:  
 "§ 91.75 Compliance with ATC clearances and instructions.

\* \* \*

(b) Except in an emergency, no person may, in an area where air traffic control is exercised, operate an aircraft contrary to an ATC instruction.

"§ 91.9 Careless or reckless operation.

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

In their appeal, respondents, although denying they heard the direction they were to make the subject turn, concede that they made a left turn despite an ATC instruction to turn right for traffic. They argue, nevertheless, that the Administrator's orders should have been reversed because, in their view, and for reasons to be discussed below, the Administrator's decision to prosecute them and to impose a sanction for the error was arbitrary and capricious. We do not agree.

The respondents assert that the Administrator does not "normally" take enforcement action against pilots who make a turn in the wrong direction. They maintain that the decision to do so here was prompted by an earlier radio exchange between respondents and ATC during which respondents had refused two instructions to descend to a lower altitude.<sup>3</sup> We think the law

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<sup>3</sup>The respondents claimed they had refused the instructions because they did not want their aircraft to consume the additional fuel a lower altitude would require. They advised ATC that if they descended they would be in violation of the FAR that obligates them to have a certain fuel reserve on an IFR flight. ATC wanted them to descend so that they could meet a crossing restriction of 22,000 feet at Orlando. While respondents knew that there was such a restriction in that vicinity, they apparently believed they could meet it without beginning a descent so soon. When respondents were about 80 miles closer to their destination, they advised ATC that they were ready to start down.

This case does not involve any charges based on the refused instructions, and we intimate no view as to the validity of the respondents' position that they were within their rights in declining to comply with those instructions. At the same time, we must take issue with the characterization by counsel for respondents that this case was brought by the Administrator "in reprisal of the flight crew's requesting an amended clearance." Res. Br. at 1. While respondents obviously wanted ATC to allow them to remain at their cruising altitude until they got closer to their destination, they never in fact requested permission to do so. We do not share counsel's apparent view that respondents'

judge acted properly in rejecting respondents' efforts to challenge the Administrator's decision to pursue this matter. The Board has long declined invitations to second-guess the Administrator's prosecutorial discretion. See Administrator v. Greiner, 1 NTSB 874, 877 (1970) (selection of which cases to prosecute, and the manner in which they are to be prosecuted, are matters within the discretion of the Administrator). The Administrator's reasons for prosecuting a specific case are not normally relevant to the review function the statute entrusts us to perform. Here the record displays an obvious connection between aviation safety and the specific violations pursued.

In light of evidence adduced in this proceeding, we cannot concur in respondents' contention that the law judge should have ordered the Administrator to respond to discovery requests that were intended to substantiate respondents' belief that the Administrator does not usually pursue enforcement action against airmen who make turns contrary to ATC instruction.<sup>4</sup> Such information would not have been relevant to the defense of the charges against these respondents, since it would have no bearing on whether they in fact operated contrary to an instruction, nor would it excuse such a violation in the peculiar facts of this

(..continued)  
advice to ATC that they were not going to let it conduct their flight planning for them constituted a request for an amended clearance.

<sup>4</sup>It follows that we find no error in the law judge's refusal to continue the hearing so that respondent could complete discovery of such non-germane matters.

proceeding. Furthermore, we are satisfied that the sanction ordered by the Administrator was appropriate and in line with established precedent in cases involving operation contrary to an ATC instruction.

The law judge, fully aware of the respondents' reprisal argument, concluded that respondents' turn to the wrong direction did compromise safety, as the controllers had testified, and found, as a result, that the careless or reckless operation charge under section 91.9 was established in addition to the operation-contrary-to-an-instruction charge under section 91.75(b). Although respondents' urge us on brief to hold that the Administrator's pursuit of a sanction here was in effect no more than an effort to retaliate for their earlier refusal to descend when twice so instructed, they have not disputed, much less demonstrated error in, the law judge's determination, for which there is clear evidentiary support in the record, that safety was breached by the conduct alleged in the complaint. In these circumstances, we perceive no valid basis for overturning the initial decision. Even if the Administrator's view of this incident is affected by the earlier dispute between ATC and the crew, that judgment is not necessarily arbitrary. As this dispute was of their own making, respondents should not now be heard to argue that the Administrator is arbitrary and capricious in sanctioning the unsafe performance which ensued.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. The respondents' appeal is denied;
2. The initial decision is affirmed; and
3. The airman certificate suspensions (30 days for respondent Forrest and 15 days for respondent Heimerl) ordered by the Administrator and affirmed by the law judge shall commence 30 days after service of this opinion and order.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.